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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Federal-State Joint Board on Universal Service	CC Docket No. 96-45

To: The Commission

PETITION FOR RECONSIDERATION

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July 17, 1997

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SUMMARY

The Commission's Order fails to comply with the Communication Act's mandate that universal service support contributions be equitable and nondiscriminatory. Specifically, the Commission's refusal to provide for discounted contributions from paging carriers disproportionately harms paging carriers *vis-a-vis* their commercial mobile radio service ("CMRS") competitors, whose costs will be offset by the benefits and support funding provided by the Order. That paging carriers derive some indeterminate benefit from a ubiquitous telecommunications network is insufficient to justify the potentially draconian effects of non-discounted contributions on the paging industry. Nor do the Commission's mandatory universal service contributions, as applied to paging carriers, comply with constitutional requirements for user fees or taxes.

The Commission must also clarify or reverse its conclusion regarding states' ability to compel universal service fund contributions from CMRS carriers. Specifically, the Commission should confirm: (1) that Section 332(c)(3) of the Act bars a state from compelling contributions unless it first determines that a CMRS carrier's service is a substitute for landline service in the state; and (2) and, pursuant to this standard, paging carriers are exempt from state universal service fund contributions.

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PETITION FOR RECONSIDERATION

ProNet Inc. ("ProNet"), through its attorneys and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, hereby petitions the Commission to reconsider its Report and Order (the "Order")[1/] in the above-captioned proceeding. In support of this petition, ProNet respectfully shows the following:

I. INTRODUCTION AND STATEMENT OF INTEREST

ProNet, a publicly-traded company, is one of the largest paging carriers in the nation, operating in all commercial mobile radio service ("CMRS") bands and serving over 1.2 million subscribers throughout the country. ProNet also provides wide-area paging services to the medical profession, operating on Special Emergency Radio Service and certain Part 90 business radio channels in over a dozen major metropolitan areas.

The Commission's Order fails to comply with the Act's mandate that universal service support contributions be equitable and nondiscriminatory. Specifically, the Commission's refusal

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1/ The *Order* was released May 8, 1997, and was published in the Federal Register on June 17, 1997.

SUMMARY

The Commission's Order fails to comply with the Communication Act's mandate that universal service support contributions be equitable and nondiscriminatory. Specifically, the Commission's refusal to provide for discounted contributions from paging carriers disproportionately harms paging carriers *vis-a-vis* their commercial mobile radio service ("CMRS") competitors, whose costs will be offset by the benefits and support funding provided by the Order. That paging carriers derive some indeterminate benefit from a ubiquitous telecommunications network is insufficient to justify the potentially draconian effects of non-discounted contributions on the paging industry. Nor do the Commission's mandatory universal service contributions, as applied to paging carriers, comply with constitutional requirements for user fees or taxes.

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to provide for discounted contributions from paging carriers, who are ineligible to receive universal service support, disproportionately harms paging carriers *vis-a-vis* their commercial mobile radio service ("CMRS") competitors, whose contributions will be offset by the benefits and support funding required by the Order. The Commission's sole explanation for its refusal to reduce the level of contributions by paging carriers, namely, that paging carriers benefit from a ubiquitous telecommunications network, is insufficient to justify the potentially draconian effects of non-discounted contributions on the paging industry, and is not rationally related to universal service.[2/] Finally, the Commission must clarify or reverse its conclusion regarding states' ability to compel universal service fund contributions from CMRS carriers. Specifically, the Commission should confirm that Section 332(c)(3) of the Act bars a state from compelling contributions unless it first determines that a CMRS carrier's service is a substitute for landline telephone service for a substantial portion of the communications within that state.

II. MANDATORY, NON-DISCOUNTED CONTRIBUTIONS FROM PAGING CARRIERS WILL CAUSE "UNECONOMIC SUBSTITUTION" AND ARE NOT COMPETITIVELY NEUTRAL

In the Order, the Commission purports to evaluate alternative methods for assessing contributions to universal service support mechanisms using three criteria: (1) ease of administration;[3/] (2) competitive neutrality;[4/] and (3) avoiding "economic substitution" of one carrier

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[2/] The Commission also claims that it lacks authority to exempt carriers ineligible for universal service support under the *de minimis* exemption; however, this rationale does not justify the Commission's refusal to consider reduced contributions in order to ensure competitive neutrality.

[3/] *Order,* at ¶844.

[4/] *Id.;* Section 254(d) of the Act.

for another solely as a result of the assessment method imposed by the Commission.[5/] In determining that paging is a service subject to mandatory contributions on a non-discounted basis, however, the Commission inexplicably deviated from the latter two criteria, thereby violating Section 254(d) of the Act, which requires universal service assessments to be "equitable and nondiscriminatory."

A. Paging Carriers Will Be Disproportionately Harmed By Non-discounted Universal Service Contributions

It is well-documented that paging competes, directly and/or indirectly, with other commercial mobile radio services ("CMRS"), including cellular, personal communications ("PCS") and interconnected specialized mobile radio ("SMR").[6/] Thus, Section 254(d) of the Act and the Commission's derivative competitive neutrality criterion mandate that universal service support provisions not unduly discriminate between these CMRS competitors. Pursuant to the Order (at ¶¶134-135), however, only common carriers providing all of the "core" services designated for

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[5/] *Order*, at ¶850.

[6/] In its *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, 10 FCC Rcd 8844, 8864 (1995), the Commission reviewed recent analyses of trends in CMRS, and found:

> evidence suggesting growing substitution . . . (b) between cellular and paging services, (c) between SMRs, paging and Business Radio Service, and (d) between nominally private mobile radio systems on the one hand and common carrier systems such as cellular, paging, and SMRs on the other. The Commission also found that traditional distinctions, such as between voice and data services and between one-way and two-way services (and terminal equipment) are collapsing.

See also, Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, WT Docket No. 96-59, 11 FCC Rcd 7824, 7872 ("*Broadband PCS Order*") ("[T]here are several other communications services each of which has some, though by no means full, cross-elasticity with cellular, broadband PCS, and interconnected SMR services. These other services are paging, narrowband and unlicensed PCS . . .").

universal service support by the Commission are eligible under Section 254(e)(1) of the Act to receive support from the universal service fund. Although the Commission explicitly confirmed (at ¶¶145-146) that wireless carriers are eligible for universal service support, paging carriers-- by definition-- are and will likely remain ineligible to receive such support because one-way paging service is incapable of providing the two-way, interactive, real-time communications and related services included as "core" universal services in ¶61 of the Order.[7/]

Therefore, the contribution and support provisions of the Order fail the competitive neutrality standards. Rather, when considered on a "net" basis, paging carriers will incur an absolute cost, while their CMRS competitors will be able to offset that cost by receiving universal service support funding mandated by the Order.[8/] Thus, to recover their universal service costs, paging carriers will have to raise prices by a higher percentage than their CMRS rivals. Having acknowledged the cross-elasticity between cellular, broadband PCS and interconnected SMR, on the one hand, and one-way paging, on the other,[9/] the Commission cannot now deny that these disparate net price increases will induce consumers to substitute two-way mobile services for paging-- solely because of the decisions made in the Order.

7/ *See* Comments of Paging Network, Inc. on Joint Board's Recommended Decision ("PageNet"), at 11-12; Comments of Celpage, Inc. ("Celpage"), at 5; Separate Comments of the paging and Narrowband PCS Alliance of the Personal Communications Industry Association ("PNPA"), at 3-4; Comments of PageMart, Inc. ("PageMart"), at 7. The Commission's statement that only "*some* paging carriers may be ineligible to receive support" (*Order* at ¶805) ignores this substantial record evidence. The Commission should explain this claim's logical converse, *i.e.*, some paging carriers will be eligible for universal service support; otherwise, the Commission cannot dispute that the *Order* will uniformly disadvantage an entire class of service.

8/ In this regard, paging carriers are in effect being required to subsidize their competitors.

9/ *Broadband PCS Order*, 11 FCC Rcd at 7872.

Further, the competitive disadvantages engendered by the Order will be magnified by several unique characteristics of the paging market *vis-a-vis* basic exchange service and other CMRS services. Because paging has never been subjected to monopoly conditions, restrictions on entry or subsidies creating competitive imbalances, the paging market is characterized by intense price competition, resulting in lower subscriber charges, lower profit margins, and a less captive subscriber base than other services.[10/] As a result, mandatory contributions will amount to a far greater percentage of paging carriers' profit margins and, if passed on to end users as contemplated by the Order, of their subscribers' rates, compared to the "benefit-eligible" CMRS services. Yet, paging carriers will be less able to pass the costs of universal service contributions to their subscribers without depressing demand and diminishing their subscriber base.[11/] In this regard, the Commission's refusal to offer discounted contributions for paging is inequitable and discriminatory, plainly violating Section 254(d) of the Act.

The Commission's rejection of reduced contributions from paging carriers deviates, without explanation, from recent precedent adopting reduced regulatory fees for paging because of the economic factors enumerated above but disregarded here. In the Regulatory Fee Order, the Commission adopted a reduced per-unit fee for paging *vis-a-vis* cellular and other CMRS services as follows:

> We have . . . determined that a reduced fee for Part 22 one-way pagers is appropriate in view of the quality of the channels afforded

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10/ *See, Assessment and Collection of Regulatory Fees for Fiscal Year 1995*, MD Docket No. 95-3, 10 FCC Rcd 13512, 13544 (1995) ("*Regulatory Fee Order*"); Celpage, at 9; Comments of Arch Communications Group, Inc. ("Arch"), at 5; Reply Comments of AirTouch Communications, Inc. ("AirTouch"), at 26.

11/ AirTouch, at 26; Arch, at 5.

> paging entities versus cellular providers . . . the paging industry is very competitive and generally has low profit margins compared to the cellular industry and to other public mobile services. . . . This permitted amendment should provide an equitable cost allocation among cellular and other public mobile licensees and paging licensees based upon their relative market pricing structures while minimizing any adverse impact on the one-way paging industry.[12/]

ProNet submits that the market conditions identified in the Regulatory Fee Order are even more compelling today. As the Commission is aware, the paging industry's second largest carrier has filed for bankruptcy protection, and virtually all publicly-traded carriers have experienced substantial declines in market capitalization during the past fifteen months; in addition, traditional sources of private and public debt and equity capital appear extremely reluctant to make new commitments to this sector. Indisputably, the paging industry finds itself in an era of unprecedented challenge. It is therefore incumbent on the Commission to justify its departure from the principles set forth in the Regulatory Fee Order even as the need for comparatively reduced "user fees" has increased.

Finally, the disproportionately negative impact on paging, and the resulting potential for uneconomic substitution, are precisely what the Commission sought to avoid elsewhere in the Order. In determining to use "end-user telecommunications revenue," as opposed to net telecommunications revenue, as the basis for determining mandatory universal service contributions, the Commission expressed concern that even theoretically equivalent assessment methods may in practice cause uneconomic substitution and market distortions, *i.e.*, where, because of long-term contracts, "some intermediate carriers cannot incorporate their contributions into their prices." Order, at ¶850. The

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12/ *Regulatory Fee Order*, 10 FCC Rcd at 13544.

Commission's efforts to mitigate such market skewing with respect to carriers with long-term contracts, on the one hand, and its flat refusal to consider mitigation for paging, on the other hand, create an internal inconsistency in the Order that is both arbitrary and irreconcilable with the Commission's stated objective of competitive neutrality.

B. Any Benefit Derived By Paging Carriers From Universal Service's Contributions To A Ubiquitous Telephone Network Are Slight Or Non-Existent

As discussed above, universal service contributions will disproportionately burden paging carriers. To offset these harmful effects, the Commission must demonstrate a corresponding benefit inuring from universal service. With respect to paging, no such corresponding benefit exists.

The Commission makes no attempt to identify any specific benefits to paging carriers from universal service,[13/] but merely asserts that paging carriers benefit from a ubiquitous telecommunications network (Order, at ¶805). Notably, however, the benefit paging derives from a general notion of ubiquity is theoretical and defies quantification.[14/] To the extent universal service can be claimed to marginally enhance ubiquity, then it is readily shown that such enhancement confers no significant benefit on paging. Subsidizing the universal service offerings set forth in ¶45 of the Order-- *i.e.*, basic telecommunications services (not including paging) to residential users in low income, rural and high cost areas; and access to advanced telecommunications services for schools, health care, and libraries-- will have minimal or no impact on demand for paging services because:

13/ *See* Celpage, at 5; PNPA, at 5-6; PageMart, at 8; PageNet, at 11-12.

14/ Moreover, as noted above, to the extent paging carriers benefit from ubiquity, these benefits are indistinguishable from benefits received by paging carriers' CMRS rivals; yet these rivals, as shown, are eligible for universal service support, whereas paging carriers are not.

- paging subscribers are predominantly business users; upon receiving a paging message, these subscribers tend to respond on a business phone (or, perhaps, a payphone); universal service is not intended to enhance ubiquity of business and commercial telephone service; and

- similarly, the majority of paging calls are initiated by business users; to the extent that residential users initiate paging calls, these users are primarily upper income, urban, and essentially unaffected by any improvements to ubiquity occasioned by universal service.

Accordingly, the Commission's conclusion in ¶805 that the benefits of a ubiquitous telecommunications network justify equal contributions from paging carriers is incorrect and should be reconsidered.

C. As Applied To Paging, Mandatory Non-Discounted Universal Service Contributions Are Unconstitutional

The Commission describes its universal service fund contributions as a "user fee" rather than a tax. Order, at ¶598. It is axiomatic, however, that even user fees must bear a fair approximation, *i.e.*, be reasonably related, to the benefits conferred.[15/] Otherwise, user fees may constitute an unconstitutional taking of property without just compensation under the Fifth Amendment to the U.S. Constitution.[16/] As shown above, however, universal service contributions, as applied to paging, in no way correspond to any benefits, and will disproportionately burden paging carriers.

Moreover, the Commission's claim that the universal service contributions are not a tax because the funds raised are not "general revenues" (Order at ¶598) is overly simplistic and misleading. By interpreting Section 254 of the Act broadly to extend the permissible use of

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15/ *Massachusetts v. U.S.*, 435 U.S. 444, 463-467 (1978).

16/ *See, e.g., Colorado Springs Production Credit Association v. Farm Credit Administration*, 967 F.2d 648, 654 (D.C. Cir. 1992).

universal service contributions to general educational objectives, the Order transforms the universal service fund contributions from a limited purpose "user fee" tied directly to regulation of telecommunications into an unconstitutional tax. Specifically, the Order requires carriers to contribute to a fund used to pay non-carriers for non-telecommunications services, *i.e.*, inside wire, computers, and software (*see* new Section 54.500(a)(2)), for the purpose of upgrading the nation's school and library facilities. These goals, while admirable, are not reasonably related to regulation of telecommunications, but are characteristic of "general welfare" goals. Thus, the universal service contributions required by the Order constitute a tax which, as noted by Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell in their July 3, 1997 Joint Petition for Stay Pending Judicial Review (at 21-22), originated in the Senate rather than the House of Representatives in violation of Article I, Section 7 of the United States Constitution.

III. THE ORDER MISCONSTRUES SECTION 332(c)(3)'S LIMITATION ON UNIVERSAL SERVICE CONTRIBUTIONS FROM CMRS CARRIERS

In ¶791 of the Order, the Commission asserts that "Section 332(c)(3) of the Act does not preclude states from requiring CMRS providers to contribute to state support mechanisms."[17/] To the extent that the Commission is merely allowing states to determine whether a given CMRS service is a substitute for land line service "for a substantial portion of the communication within a state," the Commission should clarify ¶791 accordingly, and explicitly confirm that one-way services such as paging are therefore exempt from state assessments for universal service.[18/] If the

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17/ The Commission does not affirmatively conclude that states may require universal service contributions from CMRS providers; it merely asserts that Section 332(c)(3) is not an absolute bar to such contributions.

18/ The Commission has previously determined that paging carriers are not classified as local (continued...)

Commission in fact intended to reinterpret Section 332(c)(3) to enable states to compel universal service fund contributions from any and all CMRS carriers, such reinterpretation is plainly incorrect and must be reconsidered.

The Commission admits that Section 332(c)(3) of the Act prohibits states from regulating entry or rates of CMRS providers. It also cites the relevant portion of Section 332(c)(3) with respect to universal service:

> Nothing in this subparagraph shall exempt providers of commercial mobile service (where such services are a substitute for land line telephone exchange service for a substantial portion of the communications within such State) from requirements imposed by a State commission on all providers of telecommunications services necessary to ensure the universal availability of telecommunications service at affordable rates.

Inexplicably, however, the Commission appears to conclude that the foregoing language can never bar states from imposing universal service obligations on CMRS providers, even where there is *no* CMRS-landline telephone substitutability for a substantial portion of the communications within a state. If the Commission intended this interpretation, then it should be reversed.

First, neither the Commission's Order nor the Joint Board's Recommended Decision[19/] (on which the Commission's decision was principally based) provide the requisite "reasoned determination" to support their conclusions. As shown below, the Recommended Decision merely

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18/ (...continued)
exchange carriers ("LECs"), and are unlikely to be so classified in the future, because they do not provide local exchange service or exchange access services. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order in CC Docket No. 96-98, 11 FCC Rcd 15499, 15996 (1996), *stayed in part pending judicial review sub. nom., Iowa Utilities Board v. FCC*, 109 F.3d 418 (8th Cir. 1996).

19/ *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, 12 FCC Rcd 87, 484 (1996).

excerpts a boilerplate portion of Section 254(f), ignoring clear statutory language that should have compelled a contrary conclusion. For its part, the Commission merely states that it agrees with the Joint Board; it declined even to address the substantive analysis provided by several commenters on the Recommended Decision.[20/] In this respect, the Order is arbitrary and capricious, and must be reconsidered.[21/]

Second, the Commission's apparent interpretation of Sections 332(c)(3) and 254(f) is simply wrong on the merits. Nothing in the Telecommunications Act of 1996 alters Section 332(c)(3)'s bar on state regulation of CMRS rates or entry, nor its limitation on state universal service contributions to CMRS providers found to be substitutes for basic landline telephone service. Section 254(f) provides that "[e]very telecommunications carrier *that provides intrastate telecommunications services* shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State." In adopting Section 332, however, Congress dictated that CMRS, is considered exclusively interstate for purposes of government regulation.[22/] Therefore, Section 254(f) does not apply to CMRS, and neither explicitly

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[20/] The Commission does attempt to juxtapose a Connecticut state court's recent determination that Section 332(c)(3) bars states from assessing contributions against CMRS providers (*Metro Mobile Cts. v. Connecticut Department of Public Utility Control*, No. CV-95-05512758 (Conn. Super. Ct., Judicial District of Hartford-New Britain, December 9, 1996) with a contrary decision by the California Public Utilities Commission (Decision 94-09-065, 56 CPU 2d 290 (1995)). The California PUC decision, however, predates enactment of the Communications Act of 1996 which, as shown herein, reinforces the primacy of Section 332(c)(3)'s limitations on state universal service contributions by CMRS providers. Therefore, the Commission's reliance on the California PUC decision is unavailing.

[21/] *See, e.g., City of Brookings Municipal Telephone Co. v. FCC*, 822 F.2d 1153, 1168 (D.C. Cir. 1987).

[22/] *See* H.R. Rep. No. 103-111, 103d Cong., 1st Sess., at 260 (1993) (Congressional intent to promote growth of mobile services that, by their nature, operate without regard to state lines").

nor implicitly contradicts Section 332(c)(3). Moreover, while confirming that state universal services under Section 254 are not barriers to entry, Section 253(e) of the Act provides that:

> Nothing in this section shall affect the application of Section 332(c)(3) to commercial mobile service providers.

Likewise, Section 601(c)(1) of the Telecommunications Act of 1996 provides that:

> [t]his Act and the amendments made by this Act shall not be construed to modify, impair or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.[23/]

Therefore, sound statutory construction mandates that CMRS carriers are exempt from states' universal service assessments unless or until such carriers are found to be a substitute for landline telephone exchange service for a substantial portion of communications within a state, as provided in Section 332(c)(3) of the Act. The Commission should clarify or reconsider ¶805 of its Order accordingly.

Third, despite the Commission's claims to the contrary (Order, at ¶792), the issue of state preemption with respect to CMRS, *i.e.*, interpretation of Sections 332(c)(3) and 254 of the Act, was not properly before the Commission in this proceeding; therefore, the Commission's interpretation of Sections 332(c)(3) and 354(f) violated the notice and comment provisions of Section 553(b) of the Administrative Procedure Act ("APA").[24/] As demonstrated by Bell Atlantic NYNEX Mobile in its Comments on the Recommended Decision ("BANM"), Section 254(a)(1) of the Act authorizes the Joint Board to address federal universal service only.[25/] Moreover, neither the Commission nor

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[23/] Telecommunications Act of 1996, Pub. L. No. 104-104, §601(c)(1), 110 Stat. 56, 143 (1996).

[24/] 5 U.S.C. §553(b).

[25/] BANM, at 4.

the Joint Board indicated that issues pertaining to state universal service funds were to be addressed in this proceeding.[26] Accordingly, the Commission was not authorized to rule on states' assessments of universal service contributions against CMRS providers in the Order, and its decision must therefore be reconsidered and reversed.[27]

IV. CONCLUSION

WHEREFORE, the foregoing premises considered, the Commission's Order should be modified as requested herein.

Respectfully submitted,

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[26] Indeed, the Commission explicitly limited its referral to the Joint Board to issues of federal universal service administration. *Id.*, at 3.

[27] The Commission attempts to characterize its reinterpretation of Section 332(c)(3) as an "interpretive rule" or "general statement of policy" pursuant to Section 553(b)(3)(A) of the APA. The Commission's decision, however, has immediate, direct impact on universal service contributions at the state level. The Commission has determined that the federal universal service support fund will make up twenty-five percent of total universal support, *Order*, at ¶834, and has jurisdiction to oversee state universal service contribution mechanisms. *Id.*, at ¶¶813-823. Thus, the Commission's interpretation of Sections 332(c)(3) and 254(f) of the Act operates as an instruction to the states regarding their ability to fund universal services, and creates immediate burdens on CMRS carriers with respect to state and federal universal service contributions. In this light, the Commission's claim that its decision was a mere interpretive rule or general policy statement rings hollow.